1953

Summit Range and Livestock Co. v. Ray Rees : Brief of Respondents

Utah Supreme Court

John S. Boyden; Bryant H. Croft; Attorneys for Respondent;

Case No. 8063

IN THE SUPREME COURT
of the
STATE OF UTAH

SUMMIT RANGE AND LIVESTOCK COMPANY, a corporation,
Plaintiff and Respondent,

vs.

RAY REES,
Defendant and Appellant.

RESPONDENT'S BRIEF

JOHN S. BOYDEN,
BRYANT H. CROFT,
Attorneys for Respondent.

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent, the plaintiff below, is in substantial disagreement with certain facts set forth by appellant in his statement of facts, and therefore believes it desirable to set forth the following statement of facts:

Respondent is a corporation organized October 5, 1900 pursuant to the provisions of Chapter I, Part IV of the Compiled Laws of Utah, 1888 (R. 40). The original object for which the company was incorporated, as contained in the Articles of Incorporation as well as the objects set forth in the Amendment (R. 40-49) of

April 25, 1925, are quoted on page 2 of Appellant's Brief. The Articles of Incorporation also provided that the Board of Directors shall have power to make all by-laws for the management of the business and property of the company, the regulation of its affairs and the transfer of its stock, for prescribing the duty of its officers and such other by-laws, rules and regulations as may be necessary for fully carrying out the objects of this corporation, not inconsistent with law or other corporate rights or vested privileges (R. 42). Appellant in his statement of facts states (p. 3) that "the purpose of the corporation since 1900 has remained that of a general business corporation for profit." Respondent agrees that there has been no change in the Articles of Incorporation with respect to the object, business and pursuits of the corporation since April 25, 1925, but it disagrees with the conclusion set out in said statement that the Articles created a general business corporation for profit, or that the Respondent has ever operated as such.

Respondent's complaint alleged (R. 1), and Appellant in his answer admitted (R. 7), that the Respondent owns and for many years has owned a large tract of range land in Summit County, Utah, which has been held and is now held by the Respondent for the use and benefit of the stockholders. Appellant's brief, on page 3, states that the trial court found that as time passed the company assumed a mutual, non-profit character. The Respondent disagrees with this statement of alleged fact. The trial court's findings of fact contain no suggestion that the Respondent ever "assumed" a different character

than it started with and such a finding would have been contrary to the evidence. The trial court found, as alleged in the complaint and admitted in the answer, that the Respondent had owned the land in Summit County for many years and *that it had been, and now is,* held by the Respondent for the use and benefit of the stockholders of the corporation as range land upon which the said stockholders are authorized to place their livestock for grazing purposes (R. 18).

By-laws were adopted by the Board of Directors on March 4, 1952 (R. 18) and a copy thereof submitted to the trial court upon a stipulation of the parties (R. 28, 30-39). Appellant's brief described the by-laws to be "a spelling out and an attempted ratification of the then current practices of the corporation in allowing its stockholders to use, rent free, the grazing lands of the company." (Br. 3). This conclusion is not a fact as found by the court. No evidence or testimony was offered in the trial court on the "practices" of the corporation in this regard, as the point was never raised in the court below.

Appellant is a stockholder of the Respondent corporation, owning 910½ shares of stock of the authorized 6000 shares (R. 28, 41). During the 1952 grazing season he was the only stockholder grazing cattle upon the company range (R. 28). In placing his cattle upon the company range, Appellant did so without regard to the said by-laws, whereupon the Respondent filed its complaint in the Third Judicial Court in and for Summit County on June 2, 1952, wherein the Respondent set out

generally the provisions of certain by-laws and reciting that Appellant had wilfully and intentionally placed his cattle on the range prior to the authorized date, did not advise the Board of Directors of what stock he intended to place thereon, that he refused to keep his cattle in the areas designated by the Board for the grazing of cattle, that he permitted his cattle to graze on the high summer range and did irreparable damage to young, tender grass thereon, and that he refused to discuss the matter with the Board and stated he intended to use the range in accordance with his own desires. The complaint asked that he be enjoined from placing and grazing his cattle on the range in defiance of the by-laws (R. 1-4).

Appellant answered alleging, not that the "by-laws of the company were unlawful and contrary to the objects of the articles of incorporation" as set out in Appellant's brief (Br. 4), but only that those provisions of the by-laws which stated "that the Board of Directors shall annually designate areas of the range to be used for the feeding of cattle, horses, or sheep; that such cattle, horses or sheep men shall be responsible for keeping their respective types of stock in the areas so designated by the Board of Directors" were "in this particular instance, unfair, unequitable, unlawful, contrary to the intents and objects of the Articles of Incorporation, discriminative and prejudicial" to Appellant's substantive rights as a stock holder, and that said provisions were "confiscatory of this defendant's rights to the beneficial use of the range" as a stockholder (R. 7, 8). Appellant also alleged in his answer as an affirmative defense that

"the purported by-laws were unlawful, etc., and contrary to the objects and intents of the articles of incorporation in the particular that said by-laws fail to equitably and annually assess the expenses of reasonable and beneficial use of the range as between the sheep men," and the Appellant, a cattle man (R. 9). Appellant also filed a counterclaim setting out certain of the by-laws, alleging that the Respondent company was "organized for the purpose of providing range land for cattle," that Appellant had been deprived of his equitable use of the range by the adoption of the by-laws and praying for certain remedies including one that the court declare void the provisions of those by-laws "which tend to deprive the Defendant of his fair, equitable and equal rights as a minority stockholder" (R. 9-13). An answer to the counterclaim was filed (R. 14, 15).

A question was submitted to the court upon a stipulation which provided that the only issue to be tried by the court on January 24, 1953, the date on which the case was originally set for trial, was whether paragraph 5 of Article I and paragraphs 8 and 11 of Article V of the by-laws, or any part of said paragraphs, were invalid, and that all other issues were to be tried or otherwise disposed of at a future date (R. 28, 29). The stipulation did not provide, as suggested in Appellant's brief (Br. 5), that the legality of all of the by-laws was to be decided by the court. The stipulation also included a copy of the articles of incorporation and the amendments thereto (R. 40-51) and a copy of the by-laws (R. 30-39).

The three paragraphs submitted to the trial court

for a ruling as to their validity read as follows:

Paragraph 5, Article I (R. 30, 31)

> "If any stockholder desires to sell his stock in the Corporation, or any part thereof, and shall receive a bona fide offer for the purchase of his stock from any person or persons who are not stockholders in the Corporation, the said stock may not be sold or transferred to such person or persons without first offering to sell the same to the Company or other stockholders at the price offered. Such offer for the sale of the stock shall be made to the Board of Directors by the stockholder desiring to sell, and it shall be the responsibility of the Board of Directors to determine whether the Company or any of the other stockholders wish to purchase the stock at the price offered for it.
>
> "The Board of Directors shall advise the stockholder within thirty days from the date the offer is made as to whether or not the Company or any other stockholder will buy the stock from him. Failure to so advise shall constitute a waiver of this right to buy on the part of the Company and other stockholders.
>
> "This restriction on the transfer of stock shall be valid and binding on all stockholders who agree thereto and surrender their certificates to the Company for the purpose of having this restriction stamped on the said certificates as required by Section 18-3-15 of the Utah Code Annotated, 1943."

Paragraph 8, Article V (R. 36, 37)

> "The Board of Directors shall annually designate areas of the range to be used for the feeding of cattle or horses. The extent or acreage of such

area shall be determined on the basis of the number of shares held by the stockholders desiring to place cattle or horses thereon, and shall include adequate water facilities."

Paragraph 11, Article V (R. 37)

"The cattle and horse men shall be responsible for keeping their cattle and horses within the area designated each year by the Board of Directors for use for grazing cattle and horses."

It was Appellant's contention that these three by-laws were unfair, inequitable, unlawful, contrary to the interests and objects of the Articles of Incorporation, discriminative and prejudicial to his rights and interests as a stockholder. Respondent denied the same (R. 29).

The trial court found that the said three paragraphs were not unfair, inequitable, unlawful or contrary to the interests and objects of the Articles of Incorporation, and did not discriminate and are not prejudicial to the Appellant's substantive rights and interests as a stockholder, and concluded that the same were valid and binding on the stockholders of the company (R. 18, 19). Judgment was accordingly entered adjudging the three above set out paragraphs to be valid and binding on the stockholders (R. 20, 21). The trial court did not, as stated in Appellant's brief (Br. 6), adjudge that all of the by-laws were valid, but limited its ruling to the three paragraphs of said by-laws submitted to it for determination by the stipulation (R. 20, 21).

STATEMENT OF POINTS

In reply to Appellant's brief, Respondent wishes to

present additional points for the consideration of the Court. These points, together with Point III raised by Appellant, will be specifically set out and discussed as indicated below. It is believed that Appellant's Points I and II will be covered in the Argument on the points hereinafter set forth.

POINT I.

APPELLANT CANNOT ATTACK FOR THE FIRST TIME ON THIS APPEAL THE VALIDITY OF ALL OF THE BY-LAWS OF RESPONDENT CORPORATION AS THAT QUESTION WAS NEVER RAISED IN OR DECIDED BY THE TRIAL COURT.

POINT II.

APPELLANT CANNOT CHANGE HIS THEORY OF DEFENSE UPON WHICH THE ISSUE PRESENTED TO THE TRIAL COURT WAS TRIED AND PRESENT A NEW THEORY OF DEFENSE FOR THE FIRST TIME IN THE APPELLATE COURT.

POINT III.

PARAGRAPH 5, ARTICLE I OF THE BY-LAWS IS ILLEGAL BY AUTHORIZING THE COMPANY TO PURCHASE ITS OWN STOCK IN CONTRAVENTION OF LAW.

ARGUMENT

In the opening paragraph of Appellant's brief (Br. 1) it is stated that the basic question involved in this appeal is whether the ordinary business or trading corporation can be changed into a cooperative merely by the adoption of by-laws to that effect. With this statement, Respondent does not agree. That no such question is involved will, it is believed, clearly appear from the following discussion of Respondent's Statement of Points.

POINT I.

APPELLANT CANNOT ATTACK FOR THE FIRST TIME ON THIS APPEAL THE VALIDITY OF ALL OF THE BY-LAWS OF RESPONDENT CORPORATION AS THAT QUESTION WAS NEVER RAISED IN OR DECIDED BY THE TRIAL COURT.

Appellant's Points I and II are surprising, to say the least. In his notice of appeal, Appellant gave notice of his appeal from the judgment entered in this action on May 29, 1953 (R. 23). By said judgment the trial court merely ruled that paragraph 5 of Article I and paragraphs 8 and 11 of Article V of the By-Laws adopted by the respondent corporation were valid and binding upon all of the stockholders of said corporation (R. 20). The stipulation entered into between Appellant and Respondent expressly limited the issue in the court below to the validity of the said three paragraphs (R. 28, 29). Appellant, in his Point I, now for the first time in this action attacks the validity of *all* of the By-Laws and asks this court to rule that all of said By-Laws are invalid and illegal. Not only was that question never presented to the court below, but Appellant has never at any time suggested that all of the By-Laws were invalid or illegal for any reason.

It is a well settled rule of law, established by numerous courts in numerous cases, subject to certain limitations not applicable here, that the appellate court will consider only such questions as were raised and reserved in the court below. (See cases set out in note 15, 3 Am. Jur., pp. 25-31.)

> "The rule is based upon considerations of practical necessity in the orderly administration of law and of fairness to the court and the opposite party, and upon the principles underlying the doctrines of waiver and estoppel. Obviously, the ends of justice are served by the avoidance of the delay and expense incident to appeals, reversals and new trials upon grounds of objection which might have been obviated or corrected in the trial court if the question had been raised." (3 Am. Jur. Sec. 246, p. 25-28)

The Supreme Court of Utah has followed the rule in many cases. In *Idaho State Bank v. Hooper Sugar Company,* 74 Utah 24, 276 P. 659, this court stated:

> "The contention is made on behalf of defendant Wright, however, that the complaint does not allege that plaintiff is a holder in due course of the note sued upon, and therefore no issue is raised as to whether or not plaintiff is or is not a bona fide holder for value of such note. The complaint does allege 'that the plaintiff is now the owner and holder of said note,' meaning the note indorsed by Wright and upon which this action is founded. No question was raised in the trial court that the complaint is uncertain or ambiguous in not alleging the kind of holder plaintiff claimed to be. Such question is raised for the first time in the brief filed on behalf of Wright. In the absence of a timely attack upon the complaint in such respect, Wright should not be heard to complain about any ambiguity or uncertainty of the complaint for the first time in this court." (P. 677)

In *Sandall v. Sandall,* 57 Utah 150, 193 P. 1093, this court said:

> "Many errors are assigned; . . . others raise questions not presented in the court below; . . .
>
> "Such omissions and commissions on the part of appellant are in disregard of the rules of practice of this court and have been condemned by the decisions of the court in every case with which we are familiar wherein the objection has been reasonably made and relied upon."

In *Summit County v. Gustaveson,* 18 Utah 351, 54 P. 977, this court said:

> "Counsel in the case have discussed the question of the constitutionality of the statute and the ordinance created under it, but inasmuch as that question was not presented to or passed upon by the trial court, we refrain from any discussion of that question at this time. The questions we have discussed are the only questions passed upon by the trial court."

In *North Salt Lake v. St. Joseph Water & Irrigation Co.,* 223 P. 2d 577, this court, in holding that it was unable to pass on the contention that a motion to dismiss should not have been granted for the reason that appellant Gibbs was entitled to damages for the use of the pipe line extension during a period of temporary occupancy, stated:

> "The reason that we are precluded from considering the question is that the issues were not framed in the court below. We cannot pass on matters raised for the first time in this court."

Respondent believes that the case of *Fee v. First National Bank of the Republic,* 37 Utah 28, 106 P. 517, decided by this court, is closely in point. There, as in the case at bar, counsel limited the question to be decided

by the trial court. In that case the question was limited to determining whether appellant had in fact paid the sum in controversy to the respondent or his order. The court, in its opinion, stated:

> "It seems that at the trial the question of whether such payment was made was thought to depend entirely on whether the check for $1,075 was genuine or not. This at least was the theory of counsel who represented appellant at the trial, as clearly appears from his own statement, which is incorporated into and made a part of the bill of exceptions. Counsel there said that, if the court found for the appellant 'on the question of the genuiness of the signature of Dennis Fee, . . . judgment should be entered in favor of plaintiff in the sum of $2.62, with interest and costs of suit.' Counsel for appellant thus, in effect, told the court that, if the court found that the check for $1,075 was genuine, then appellant was entitled to a credit for the gross amount deposited which it had admitted it had received from respondent, and under such finding respondent would be still entitled to a judgment for $2.62, the balance remaining on deposit with appellant. Counsel thus asked the court to make appellant's liability depend upon the genuineness of the signature to the check, and upon nothing else. *The court thus eleminated all other questions . . .*" (Emphasis ours).

Appellant in its brief, in the Fee case, argued that there was evidence tending to show that respondent authorized the drawing and issuance of the check to which respondent's name was signed without his authority. Appellant also pointed out that there was some evidence tending to show that respondent was guilty of a

lack of diligence in failing to notify appellant not to honor or pay the check. The court said:

> "Appellant now urges that we pass upon those questions and insists that the findings and judgment ought to have been in favor of appellant, in view of the state of the evidence upon those questions. *These matters were, however, not submitted to the trial court.* As we have seen, the pleadings presented but one issue and that was whether appellant had on respondent's demand paid him the sum of $1,075. . . If we should assume, therefore, that under the issues presented by the pleadings the court should have passed upon two propositions (1) whether the check was genuine — that is, whether it was signed by respondent—and (2) if not signed by him, whether he nevertheless permitted the same to be issued, presented for payment, and paid, when he could have prevented such a result, yet *in view of the only question which counsel for appellant asked the trial court to pass on,* and which it did, we are not authorized to pass upon the second proposition stated above, *for the reason that the trial court did not pass upon it and was not asked to do so,* but the court was asked to and did make the liability of appellant depend upon the genuineness of the signature to the check. . . If counsel had no confidence in the evidence adduced in support of the second proposition, why should the court have considered it? The findings respond to the issues as presented by the pleadings, and, in view of counsel's statement to the court, they also covered all questions raised by the evidence. This is all appellant can insist upon, and this is especially so in view of the fact that appellant did not request any findings upon the collateral questions which it now urges should be passed upon. (As in the

case at bar.) The most that can be said with regard to the appellant's contentions relative to the findings is that appellant has changed counsel (as in the case at bar) and that it has also changed the theory upon which the case was presented to the trial court." (Emphasis added)

It is, therefore, Respondent's contention that Appellant cannot raise in this court any question relating to the validity of the By-Laws adopted by the Respondent corporation, because no such question was ever submitted for consideration of the court below, and consideration of the court below was limited to the validity of the three By-Laws.

POINT II.

APPELLANT CANNOT CHANGE HIS THEORY OF DEFENSE UPON WHICH THE ISSUE PRESENTED TO THE TRIAL COURT WAS TRIED AND PRESENT A NEW THEORY OF DEFENSE FOR THE FIRST TIME IN THE APPELLATE COURT.

The Appellant, in Points I and II of his Statement of Points, has changed the theory and defense upon which the issue was presented to the trial court. In the court below it was Appellant's contention that the aforementioned three paragraphs in the By-Laws, the validity of which was submitted to the court below as the only issue, were invalid because they deprived him of the beneficial use of the Respondent's range for grazing his individually owned livestock thereon and prevented him from using it in accordance with his own wishes. Appellant, in his brief, for the first time now contends that all of the By-Laws, including the two specifically passed

upon by the trial court and set out in his Point II, are invalid and illegal for the reason that they change the purpose and character of the company from that of a general business corporation to a non-profit cooperative association. No such theory was ever suggested to the trial court. Had Appellant raised that theory or defense in the court below, evidence and testimony could have been taken from which the trial court could have decided that contention. Appellant, in his brief, assumes that the Respondent corporation started as a general business corporation and changed to a cooperative upon the adoption of its By-Laws on March 4, 1952. Not only is such assumption erroneous, but Appellant himself knows that the use to which the range has been put has never changed over the years (R. 58).

In the stipulation it was specifically stated that it was Appellant's contention that the aforementioned three paragraphs of the By-Laws were "unfair, inequitable, unlawful, contrary to the interests and objects of the Articles of Incorporation, discriminative and prejudicial to the defendant's (Appellant's) substantive rights and interests as a stockholder." (R. 29). The stipulation did not state in what particulars the said three paragraphs met these contentions and the question may well be asked, "What was Appellant's theory or defense in the court below?"

> "In order to determine the theory of a case as presented to the trial court, the appellate court will look to the entire record and the briefs of counsel and will construe the pleadings on the theory most apparent, most clearly outlined by

the facts stated and according to their general scope and tenor." (3 Am. Jur., Sec. 253, p. 38)

An examination of the record will disclose that Appellant in the court below never suggested at that time or in any of his pleadings that the By-Laws or any of them were invalid because they changed the nature of the business from that of a business corporation for profit to a non-profit cooperative association. His contention that certain of the By-Laws were contrary to the interests and objects of the corporation was never based in the court below upon the theory he now attempts to assert on appeal. On the contrary, in the court below Appellant went to the opposite extreme and based his attack upon certain of the By-Laws upon the ground that as a stockholder in Respondent corporation he had the unqualified right to place his cattle upon the company range without restriction except as to the number of cattle to be so placed, that the By-Laws as adopted interfered with that right, and that he had that right as a stockholder by virtue of the fact that the company was originally organized for the purpose of providing range land for the stockholders' cattle. Appellant knows that the company never operated for profit and that the By-Laws made no change in the operations of the Respondent with respect to the purpose for which the range was owned and held by the Respondent.

An examination of the record will support Respondent's foregoing statement of Appellant's theory in the trial court. In his answer to the complaint, Appellant, in discussing paragraphs 8 and 11 of Article V of the By-

Laws, makes the same contentions with respect thereto as those set out in the stipulation and heretofore in this brief, and asserts that said By-Laws were "confiscatory of this Defendant's right to the *beneficial use* of the range pursuant to his share of stock in the plaintiff corporation for the Board of Directors *to require him to keep his cattle in the areas designated* by the Board of Directors," (emphasis ours) and further, that because he is the only stockholder "running cattle on the range," the others being sheep men, the said two By-Laws deprive him "of his equitable beneficial use of the range." (R. 7, 8).

Further light is thrown upon the question of what Appellant's theory was in the trial court in his Third Defense to the complaint set out in his answer, wherein Appellant asserts that the purported By-Laws referred to in the complaint "are unlawful, inequitable and prejudicial to the substantive rights of the defendant as a minority stockholder in the plaintiff corporation and are contrary to the intents and objects of the Articles of Incorporation of the plaintiff corporation *in the particular* that said By-Laws fail to equitably and annually assess the expenses of reasonable and beneficial use of the range as between the sheep men and this defendant, who is a cattle man." (Emphasis ours) (R. 9) In this Third Defense, Appellant also alleges that he has offered "to accept a division of the range land proportionate to his share in said plaintiff corporation," and that the Board of Directors has refused to cooperate with him in "working out a fair and impartial solution to the prob-

lems incidential to running sheep and cattle on the same range." (R. 9)

The theory of Appellant's defense is also revealed in his Counterclaim, wherein, after setting out certain by-laws, including the three which were submitted to the court for a ruling thereon, Appellant alleges that originally the Respondent company was organized for the purpose of *"providing range land for cattle,"* but that since then substantially all of the stockholders except Appellant have become sheep men. It is further alleged that in passing and enforcing said by-laws the company had made "it utterly impracticable, unfeasible, and economically impossible for defendant to keep his livestock in the area or areas designated," and that the Respondent has failed and refused to "take cognizance of this defendant's rights to fair and equitable use of the range as a shareholder." (R. 11)

Appellant's prayer for relief in the Counterclaim prays that the court restrain the Appellant from administering the affairs of the company which in any manner deprives the Appellant *"of any equal and equitable beneficial use of the range."* He further asked the court to either (1) divide and partition the company's range land and to set aside his proportionate share as his "own land in fee simple," (2) appoint an impartial referee to make an inspection and recommendation to the court for the designation of a permanent area or alternating areas of the range to be used as cattle range so that said area or areas might be fenced at the Respondent's expense, or (3) that necessary herders be hired at corporation expense (R. 12, 13).

Appellant's counsel in the court below submitted a memorandum brief and a reply which clearly demonstrate his theory and defense. On page 3 of his memorandum brief appears the following:

> "Surely our opponents will concede that the primary purpose and object of the plaintiff organization was *to enable its members to receive equal beneficial use of the range in proportion to the respective shares held by each member. This has been the primary objectives of this company for over forty years . . .* " (emphasis ours) (R. 58)

And on page 4 of his memorandum:

> "The real sting in the by-laws, and which has precipitated this law suit, is found in Article V, paragraph 11, which *deprives the defendant, not only of a fair and equal beneficial use of the range,* but would force him out of the corporation, and incidentally, deprive him of his present means of livelihood. Such effect was never the intent and purpose of the corporation when organized exclusively as a cattle range, or when the articles were amended to permit both cattle and sheep on the range . . .
>
> " . . . said by-laws are *in the particular referred to* unfair, unequitable, unlawful, *contrary to the intents and objectives of the Articles of Incorporation,* discriminative and prejudicial to the sustantive and contractual rights and interests of the defendant . . . " (emphasis ours) (R. 59)

Appellant's reply memorandum brief filed in the court below contains similar allegations (R. 70-72).

Thus, it can be seen that Appellant in the court below never took the position, as he now does, that the three

by-laws in question, or all of them for that matter, were unlawful, discriminative, prejudicial to his rights or contrary to the interests and objects of the Articles of Incorporation because they change the company from a general business corporation to that of a cooperative. His theory and defense was entirely based upon the claim that the by-laws prevented him from using the company range as he saw fit and as he had always done in the past in placing his own cattle upon it.

It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal. This rule has been followed by this court in many cases.

In *Holman v. Christensen,* 73 Utah 389, 274 P. 457, this court said:

> "The pleadings and the trial proceeded upon the theory that the spring water involved in this controversy was originally public water, and as such, subject to appropriation. The cause having been tried on such theory, we are not at liberty to dispose of it upon some other theory."

Smith v. Sinaloa Land & Fruit Co., 42 Utah 445, 132 P. 556, was a case in which plaintiff contended in his complaint that the assessment against his stock was void for certain stated reasons. For the first time on appeal he alleged as a reason that the assessment was void that the statute prevented assessments against fully paid stock unless expressly authorized in the articles of incorporation and that since the articles were not in evidence, there was nothing to show it was permissible. This court pointed out that "neither by the pleadings nor evidence

was it claimed or shown that the assessment was not authorized by the articles of incorporation." This court then said:

> "No such point was made in the court below. It is pressed on us here for the first time without issue or evidence . . . In this the plaintiff does violence to the familiar rules that judicial inquiries must be confined to the issues, and that one may not present and try a cause on one theory in the court below and be heard on another in the court above."

In *Chipman v. American Fork City,* 54 Utah 93, 179 P. 742, the court held that the defense that the damage complained of was the result of an act of God was not available on appeal because not raised in the court below.

This rule was again stated by this court in *Aaron v. Holmes,* 35 Utah 49, 99 P. 450, as follows:

> " . . . It is also a well-settled rule that a theory, assumed and acted upon by the parties litigant in the trial court, must be adhered to upon appeal. Lebcher v. Lambert, 23 Utah 1, 63, Pac. 628; Elliott on App. Pro. § 490. In 2 Cyc. 670, it is said: 'One of the most important results of the rule that questions which are not raised in the court below cannot be reviewed in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, but that such party is restricted to the theory on which the cause was prosecuted or defended in the court below. Thus, where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review.' Numerous cases are cited in the

footnote, which illustrate and support the doctrine. As we have pointed out, respondent conceded in the lower court that appellant's default occurred through 'inadvertence and excusable neglect,' and the questions involved were submitted to the court upon that theory. Therefore under all the authorities he is precluded from taking any other or different position in this court."

In *Obradovich v. Walker Bros. Bankers,* 80 Utah 587, 16 P. 2d 212, this court held that where, in the trial court, the objection was made that the testimony offered by a witness was irrelevant and immaterial and self-serving, and, for the first time on appeal, appellant contended that the witness offering such testimony was not a competent witness in the proceeding because of a statutory prohibition, it would not consider that objection because that theory had not been presented in the court below.

In *Neilson v. Eisen,* 116 Utah 343, 209 P. 2d 928, in which case the only contention appellant Eisen made in the trial court was that his daughter was not acting as his agent when she entered into a contract of purchase of a home, this court said:

> "However, upon this appeal that contention has been abandoned by Mr. Eisen. He now contends for the first time that (1) (three other separate contentions set out)."
>
> "It is not necessary for us to examine on their merits the three contentions raised by Mr. Eisen on this appeal. They are all matters of defense which should have been raised below and cannot now be heard here for the first time."

Appellant's entire argument in his brief is based upon his assertion that the Articles of Incorporation created a general business corporation for profit and that the by-laws changed that purpose to a non-profit cooperative. Had he raised it in the trial court, Respondent would have had an opportunity to show otherwise and the trial court would have had the benefit of evidence and testimony in passing upon such argument. The principles of law laid down by the courts in the cases cited by Appellant may well be correct, but it is neither fair to the trial court nor to Respondent to raise the defense or theory asserted in his Points I and II here for the first time on appeal.

Respondent wishes to point out, however, that there is no basis for the defense now raised by Appellant in this appeal. As stated before, the Respondent company was incorporated in 1900 under the Compiled Laws of Utah, 1888. Section 2267 permitted the formation of all types of corporations, as for example, "benevolent, charitable or scientific associations, *or for any rightful subject*. . . " The Articles of Incorporation gave to Respondent the power "to buy, hold, own, occupy and sell real estate." (R. 40) It has bought and sold real estate, and it now holds, owns and occupies real estate, and has ever since its incorporation. Respondent was also given the power to assess the stock "to meet all incidental expenses of the company." (R. 43) If it were organized as a profit-making company, it would hardly need provide for assessments to meet the "incidental expenses of the company." It is true that the company does not exercise all

its powers, and never has, but, as is generally the case, the powers given under the articles were broad and generally stated, and it is fundamental that a corporation need not exercise all of its powers granted under the articles. At the risk of being repetitious, let us say that no clearer statement of the purposes for which the company was organized can be given than that made by Appellant's counsel in the court below when he said that "the primary purpose and object of the plaintiff organization was to enable its members to receive equal beneficial use of the range in proportion to the respective shares held by each member. *This has been the primary objective of this company for over forty years. . .* " (R. 58) The company has never operated as a general business corporation for profit and was not organized as such. Since Appellant has changed his theory as herein pointed out, Respondent deems it unnecessary to pursue this matter further, but did desire to point out to the court that there is, even so, no merit to Appellant's contentions.

POINT III.

PARAGRAPH 5, ARTICLE I OF THE BY-LAWS IS ILLEGAL BY AUTHORIZING THE COMPANY TO PURCHASE ITS OWN STOCK IN CONTRAVENTION OF LAW.

Appellant contends that this provision of the by-laws is illegal because Section 76-13-4(2), Utah Code Annotated 1953 (formerly Section 103-12-4), as that section is interpreted by this court in *Pace v. Pace Bros. Co.,* 91 Utah 132, 59 P. 2d 1, prohibits a corporation from purchasing its own stock.

In *Pace v. Pace Bros.,* the facts involved a suit by a distributee on promissory notes given by the corporation to the distributee's father in exchange for the latter's stock in the corporation. A mortgage on the corporate property was given to secure the notes and the suit was one of foreclosure. The Supreme Court took the position that Section 103-12-4, R. S. 1933, prohibited a corporation from purchasing its own stock under the circumstances that existed in the Pace case. In so doing, the court said:

> "We consider the question as to whether the defendant corporation, under the circumstances in which this purchase was made, had authority to buy its own stock held by Sidney Pace. *Our decision on that question will be limited strictly on the facts of this case.*" (Emphasis added)

The court also made the observation that, "In the instant case the purchase of Sidney Pace's stock does appear not to have been done for the protection of the company, but for the benefit and accomodation of Pace," and in its decision stated:

> "We believe that 103-12-4, subd. 2., was designed to prevent the purchase by a corporation of its own stock even though at the time of the purchase it was not insolvent nor would be by such purchase rendered insolvent, *at least in cases where it was not for the protection of the corporation or for its legitimate corporate purposes.*" (Emphasis ours.)

The court also points out in the Pace case that there was no evidence that the property covered by the mortgage was not part of the "capital" of the company rather

than being included as "surplus" on the books of the company.

Thus it seems to Respondent that the Pace decision must be limited to the facts of that particular case and cannot be taken to mean that any repurchase of its stock by a corporation, regardless of the circumstances, is void under the law.

In the instant case the attack is merely upon the legality of a by-law that provides that in the future a stockholder desiring to sell his stock must first offer to sell the same "to the Company or other stockholders at the price offered." If such a time came, the circumstances may be such that even under the doctrine of the Pace case, the purchase by the company, if undertaken, might be justified by (1) the need of the company to protect itself, as, for example, from selling the stock to one who had an inferior or diseased group of cattle or sheep to place on the range, or (2) by the fact that the purchase could be made by some means other than through use of the "capital" of the company.

But aside from all this, Respondent believes there is a more important reason to support the legality of this by-law.

At the time the Pace case was decided, subsection (2) of 103-12-4, R. S. 1933, read as follows:

> "To divide, withdraw or in any manner, except as provided by law, pay to the stockholders, or any of them, any part of the capital of the corporation;"

However, in 1943, this section was amended to

exempt from its provisions the redemption and retirement of preferred stock on the condition and in the manner provided by the articles or the preferred stock certificate. And in 1951, a new section, approved March 1, 1951, prior to the adoption of the by-laws by Respondent, was added to the law of corporation (Laws of 1951, Chap. 23, Sec. 2). This section, now 16-2-16, Utah Code Annotated 1953, reads in part as follows:

> "A corporation may purchase or redeem one or more shares of any and all classes of its own capital stock in any of the following cases:
>
> . . . . .
>
> "(f) In any case where the use of the funds or property of a corporation for such purchase or redemption would not cause the impairment of that portion of its assets acquired as consideration for its shares or that portion which has been treated as payment for shares allotted as stock dividends."

Appellant ignores subsection (f) and states only that "no provision is made in Section 16-2-16 for a general purchase by the corporation of its own stock which would change in any way the restriction of Section 76-13-4 (formerly 103-12-4) or the strict interpretation placed upon that latter section by the Pace case." The Pace case itself interpreted the clause "except as provided by law," as usd in 103-12-4(2) and now included in 76-13-4(2), to mean statutory law and not general law as it exists in the states and enunciated by the courts.

Section 16-2-16(f) does away with the restriction of 76-13-4, Utah Code Annotated 1953 (formerly 103-12-4)

except in those cases where the purchase of its own stock would "cause the impairment of that portion of its assets acquired as consideration for its shares," and there is no basis whatsoever for Appellant's position that this by-law is illegal, in the absence of any showing that the by-law itself would require the purchase of its own stock in a manner that would impair that portion of its assets acquired as consideration for its shares.

Appellant makes no mention of that portion of paragraph 5, Article I which restricts the sale of his stock by a stockholder without first offering it to other stockholders. Even if it could he held that that part of the by-law directing that stock be offered first to the company is illegal (which we don't concede in any sense of the word), it remains that that part of the by-law requiring an offer "to other stockholders" is valid.

> "Where a bylaw is entire, each part having a general influence over the rest, if one part is void, the whole is void; but where a by-law consists of several distinct and independent parts, though one or more of them is void, the rest are valid. This rule is applicable to the different clauses of the same by-law; for where it consists of several particulars, it is, to all intents and purposes, several by-laws, though the provisions are thrown together under the form of one." (13 Am. Jur. 287, Sec. 156)

The right to impose restrictions upon the transfer of stock by means of by-laws is recognized under the Uniform Stock Transfer Act and Section 16-3-15 of Utah Code Annotated, 1953, where the restriction is stamped upon the stock certificate.

According to the weight of authority, a corporate by-law prohibiting the sale or transfer of its stock to an outsider without first giving the other stockholders an opportunity to purchase the same is valid and binding on the stockholders. (65 A. L. R. 1168)

The by-law in question expressly provides it shall not be binding on any stockholder unless he surrenders his certificate for the purpose of having the restriction stamped on it (R. 31). Consequently, Appellant is not bound by it unless he voluntarily consents to having such restriction stamped on his certificate. Once he does so, he is bound by his consent, because the by-laws are part of the contract that exists between the stockholders. Appellant has not done so. While Respondent questions Appellant's right to attack the validity of a by-law by which he is not bound, in view of what has already been said Appellant believes there is no need to pursue the matter further.

In summary, it is incredible that Appellant should claim in the trial court that he will be denied, by these three by-laws, the beneficial use of the range as a stockholder, which use, he rightfully states, its stockholders have had for "over forty years," and for which purpose, he states, the company was organized, and then come before this court, reverse himself, and for the first time suggest that all of the by-laws are invalid, and in effect, state that for fifty-three years the company has operated illegally by permitting its stockholders to use the company range.

As was stated in the Fee case (supra), "the most

that can be said with regard to Appellant's contentions . . . is that Appellant has changed counsel."

CONCLUSION

The judgment of the District Court in adjudging paragraph 5 of Article I and paragraphs 8 and 11 of Article V to be valid and binding on the stockholders should be affirmed for the reasons stated.

Respectfully submitted,

JOHN S. BOYDEN,
BRYANT H. CROFT,

Attorneys for Respondent.